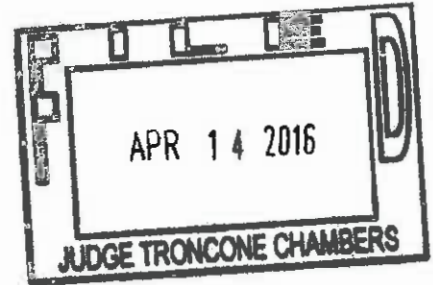


ORDER PREPARED BY THE COURT:

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, OCEAN COUNTY
CIVIL ACTION
ORDER

HARRY SCHEELER,
Plaintiff,
v.
OCEAN COUNTY PROSECUTOR'S
OFFICE and NICHOLAS MONACO in his
Capacity as Records Custodian for the
Ocean County Prosecutor's Office,
Defendants.

DOCKET NO. OCN-L-3295-15



THIS MATTER, having come before the Court, and the Court having considered submissions by counsel and any and all responses thereto the Court having found that the following order should be entered;

IT IS, on this 14th day of April, 2016, **ORDERED** as follows:

IT IS ORDERED that plaintiff's request for attorney fees and court costs is **GRANTED**; and

IT IS FURTHER ORDERED that plaintiff shall submit a certification of legal fees and court costs for review within 20 days from the date of this Order; and

IT IS FURTHER ORDERED that Defendant OCPO shall have ten days thereafter to submit a written response to plaintiff's certification; and

IT IS FURTHER ORDERED that a copy of this Order shall be served on all parties within 7 days.

MARK A. TRONCONE, J.S.C.

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS**

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – CIVIL PART**

HARRY SCHEELER,

Plaintiff,

v.

OCEAN COUNTY PROSECUTOR'S
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CIVIL ACTION

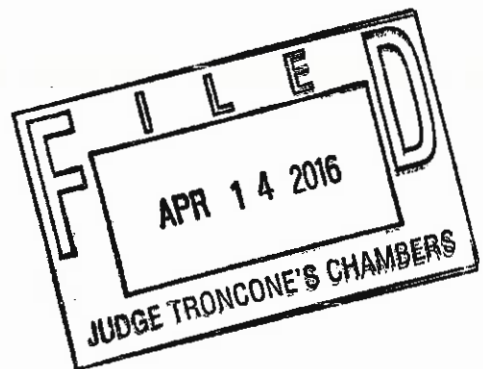
OPINION

Decided: April 14, 2016

Counsel: CJ Griffin, Esquire for the firm of Pashman Stein, on behalf of the Plaintiff,
Harry Scheeler

John C. Tassini, Assistant Prosecutor on behalf of the Defendants, Ocean County
Prosecutor's Office and Nicholas Monaco, individually

MARK A. TRONCONE, J.S.C.



NATURE OF THE PROCEEDING

Plaintiff, Harry Scheeler, ("Scheeler") seeks relief under New Jersey's Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1.1 et. seq. Specifically, Scheeler seeks records relating to the January 8, 2015 arrest of Andrew Flinchbaugh ("Flinchbaugh"), a local journalist. Defendant, Ocean County Prosecutor's Office ("OCPO"), the agency who arrested Flinchbaugh has denied Scheeler's request. Initially, the OCPO denied access on the basis that the records were exempt from public access as a part of an ongoing investigation. OCPO also claimed the records were exempt as a result of a pending settlement between it and Flinchbaugh.

Based upon OCPO's response to his request, Scheeler brought an Order to Show Cause action asking this court to declare the actions of the OCPO to be in violation of OPRA and ordering OCPO to release the requested records. Scheeler also claims access by his rights under common law. Finally, plaintiff also sought attorney fees and court costs as authorized by OPRA. Since the filing of the Order to Show Cause, the parties have resolved their dispute relating to the production of the requested documents. The only issue remaining relates to plaintiff's request for attorney fees and costs. In response, the OCPO asserts that Scheeler does not have standing to bring this action because he is not "a citizen" of the State of New Jersey. He is therefore not entitled to an award of attorney fees and costs. No other defense has been asserted by OCPO before this court.

For the reasons expressed below, the court rejects defendant's lack of standing defense and accordingly finds the plaintiff is entitled to an award of counsel fees.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

According to the certification submitted in support of his application to the court, plaintiff Harry Scheeler is a self-described “open government activist.” Since the time he was fifteen years old and for decades since, Mr. Scheeler has utilized OPRA to seek the production of public records and has filed, by his own count, over one hundred actions with the Government Records Council and twenty five actions in New Jersey Superior Court. Although a lifelong resident of New Jersey, he moved to North Carolina in August, 2014 for health and financial reasons.

Despite his relocation, Mr. Scheeler has continued his so-called “audits” of local and state agencies in New Jersey. He continues to submit OPRA requests and where denied he, on occasion, files the appropriate appeal. While doing this work primarily for his own purposes, Mr. Scheeler freely admits that because of his intimate knowledge of OPRA he often lends assistance to third parties and at times files requests on their behalf so they can remain anonymous.

On the evening of January 8, 2015, Flinchbaugh, a reporter for a local newspaper, arrived at the scene of a fatal one-car accident involving a detective for the OCPO. In documenting the emergency response at the scene, Flinchbaugh took photos and a video on his smart phone. As he was leaving the scene, Flinchbaugh was approached by Detective David Margentino (“Margentino”) of the OCPO. Margentino demanded that Flinchbaugh surrender possession of his smart phone since it contained evidence of the accident. Flinchbaugh refused. The two parties argued for several minutes. Flinchbaugh asserted that as a member of the press he had a right to document the scene. Flinchbaugh also offered to allow Margentino to view any photos or video footage and make copies of the same but steadfastly refused to surrender his phone. Ultimately, Margentino arrested Flinchbaugh for obstruction of law administration and seized his phone. Two days after the arrest, OCPO dropped all charges against Flinchbaugh.

On September 9, 2015, Scheeler submitted an anonymous OPRA request seeking the following records:

This is an OPRA request. I am also asserting my rights under the Common Law Right of Access for the following records. Please fax all records to 704-870-3173.

Please provide the arrest report and all information obtainable under executive order 69 for the 1/8/15 arrest of Andrew P. Flinchbaugh, 23, of Lacey, working for *The Lacey Reporter*.

Please also provide any incident reports associated with this arrest. It's my understand [sic] the charges were dropped. Please provide any correspondence with Mr. Flinchbaugh notifying him the charges were dropped.

Please provide the accident report associated with the investigation by Detective David Margentino for the crash involving the OCPO on Dover Road on 1/8/2015.

Please also provide the resume for David Margentino at the time of hire, the date of hire and salary. Please also provide all training certifications.

Please see the attached article for additional information.

On September 18, 2015, Assistant Prosecutor Nicholas Monaco ("Monaco"), the Custodian of Records for OCPO, responded to Scheeler's anonymous request. In his letter, Monaco stated:

Please be advised that, pursuant to N.J.S.A. 47:1A-1.1 et seq., the requested materials concerning Andrew Flinchbaugh are criminal investigatory records and therefore exempt from disclosure through OPRA. Please also see the recent rulings in *North Jersey Media v. Township of Lyndhurst*, 441 N.J. Super. 70 (App. Div. 2015), with regards to criminal investigatory records exemptions and N.J.S.A. 47:1A-3, [Records of investigations in progress], which provides in part:

Notwithstanding any other provision of this subsection, where it shall appear that the information requested or to be examined will jeopardize the safety of any person or jeopardize any investigation in progress **or may be otherwise inappropriate to release, such information may be withheld.** This exemption shall be narrowly construed to prevent disclosure of information that would be harmful to a bona fide law enforcement purpose or the public safety...

The underlying matter involving Andrew Flinchbaugh, a reporter from the Lacey Reporter, is the subject of settlement negotiations between the Ocean County Prosecutor's Office, the County of Ocean, and legal representatives from the American Civil Liberties Union (ACLU), on behalf of Mr. Flinchbaugh. Therefore, disclosure of any materials related thereto would be entirely inappropriate and would be inconsistent with the proposed settlement, whose purpose it is to protect Mr. Flinchbaugh's privacy interests. Therefore, for the reasons set forth hereinabove, your request for documents is denied.

With regard to your request for materials pertaining to Detective David Margentino, please be advised of the following:

A public employee's training and education are personnel records, exempt from disclosure unless they fall within one of the statutory exemptions. Kovalcik v. Somerset County Prosecutor's Office, 206 N.J. 581,593-594 (2011). N.J.S.A. 47:1A-10 provides that "data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record." See, also Executive Order 11 (Bryne [sic] 1974). However, this exemption is further narrowed by Executive Order 26 §4(c) (McGreevey 2002), which exempts from production "[t]est questions, scoring keys and other examination data pertaining to the administration of an examination for public employment or licensing."

As a result, public employee training and education documents are only subject to production to the extent that they disclose the public employee has completed specific training or education that is required for his or her employment. Id. at 593-594. The applicability of this exemption depends on the nature of the contents of the particular documents and the specific educational requirements for employment. Id. at 595, See, e.g., Killino v. Municipal Clerk, Delran Township, GRC Compliant No. 2003-20 (February 18, 2004) (township produced certain firearms and vehicular training records under N.J.S.A. 47:1A-10 because they reflected compliance with "experiential" qualifications for employment of the individuals in question).

For the reasons set forth hereinabove, your request for the resume and training certifications of Detective David Margentino are denied. Pursuant to N.J.S.A. 47:1A-10, however, the

information you requested about Detective Margentino is as follows:

Title - Detective, date of hire – September 8, 2009, and current salary - \$69,127.00.

In his letter, Monaco also denied Scheeler's common law right of access.

Also, on September 18, 2015, Scheeler submitted a second OPRA request to OCPO seeking:

- 1) All information pertaining to the arrest of Andrew Flinchbaugh on January 8, 2015 pursuant to N.J.S.A. 47:1A-3b;
- 2) All complaints filed against Andrew Flinchbaugh regarding the January 8, 2015 arrest even if they were later withdrawn; and
- 3) A copy of Detective David Margentino's 2015 year to date payroll register.

On October 16, 2015, Mr. Monaco responded to Mr. Scheeler.¹ Monaco stated at that time that OCPO was still reviewing his requests. A copy of Margentino's payroll register was provided. However, no other documents were provided.

Dissatisfied with OCPO's response to his various requests, Scheeler filed the Order to Show Cause on November 30, 2015. As noted above, subsequent to the filing of the Order to Show Cause, Scheeler and the OCPO came to an agreement on the disclosure of the requested documents. Therefore, the only remaining issue is whether the plaintiff is entitled to fees and costs under OPRA. At the return date on February 19, 2016, the court heard arguments of the parties on that issue. The court also received additional legal briefs from the parties following oral argument.

STANDARD OF COURT REVIEW

It is well-settled that OPRA matters are to be considered in a summary fashion. The statute provides that "[a]ny such proceeding shall proceed in a summary or expedited manner."

¹ By this time, Scheeler had disclosed his identity to Mr. Monaco.

N.J.S.A. 47:1A-6. Upon the denial of an OPRA request, a plaintiff has forty five days to bring an action either before the Government Records Council or to the Superior Court. Ibid. A government agency's defense of the OPRA claim is considered as a cross-motion for summary judgment. Barnett v. County of Gloucester, 415 N.J. Super. 506, 511 (App. Div. 2010).

Under OPRA, the government agency has the burden of proving the denial of access is authorized by the statute. N.J.S.A. 47:1A-6. To meet that burden, the agency must establish that the requested governmental record fits within one of the twenty one categories of information which are exempted from disclosure. See, Mason v. City of Hoboken, 196 N.J. 51, (2008) citing to N.J.S.A. 47:1A-1.

Although OCPO had cited to several categories of exemptions when denying Scheeler's request, it now bases its defense on one contention, i.e., that as a resident of North Carolina, Mr. Scheeler is not a "citizen" of New Jersey and therefore has no standing to bring this action under OPRA.

LEGAL FINDINGS

PLAINTIFF HAS STANDING TO BRING THIS ACTION AND IS THEREFORE ENTITLED TO AN AWARD OF ATTORNEY FEES AND COURT COSTS

The lack of standing defense advanced by OCPO makes this case one of first impression. There does not appear to be any controlling statutory or case law on this issue.²

² Recently, two New Jersey trial courts have considered this issue with conflicting results. On October 2, 2015, the Hon. Ronald Bookbinder, A.J.S.C. rejected the lack of standing defense of a public joint insurance fund defendant in Scheeler v. Atlantic County Municipal Joint Insurance Fund, et. al., Docket No. BUR-L-990-15 (Burlington County). Subsequently, in a Cape May County case, the Hon. Nelson C. Johnson, J.S.C. agreed with the defendant municipality's contention that the plaintiff lacked standing to bring his OPRA claim. Scheeler v. City of Cape May, Docket No. CPM-L-444-15 (Cape May County). Both of these cases were brought by the same person who

OCPO urges this court to limit standing to bring an action under OPRA to New Jersey “citizens.” It bases this decision on the use of that term in the statement of Legislative Findings and Declarations:

The Legislature finds and declares it to be public policy of this State that:

[G]overnment records shall be readily accessible for inspection, copying or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the on the right of access accorded by [this law] shall be construed in favor of the public’s right of access; . . . N.J.S.A. 47:1A-1

The use of term “citizen”, according to OCPO evinces an intent on the part of the Legislature to limit public access to citizens of New Jersey to the exclusion of all others “because New Jersey citizens are the ones with a legitimate interest in the documents held by New Jersey agencies.”³ Although OCPO does not cite to any controlling New Jersey case law, it argues that the United States Supreme Court decision in McBurney v. Young, 133 S. Ct. 1709 (2013) supports its position.

In McBurney, the Supreme Court upheld the State of Virginia’s Freedom of Information Act which limited access to public records to citizens of that Commonwealth. Unlike New Jersey’s law, however, the word “citizen” is used throughout the text of the statute, and significantly, in its operational provisions.

In the final analysis, OCPO’s argument rests on too slender a reed and must therefore be rejected.

is the plaintiff here and thus the facts relating to his standing are identical to those presented in this matter.

³ Motion brief of OCPO at page 4.

Under OPRA, the term “citizen” is not defined and appears nowhere other than in the statement of Legislature Findings and Declarations which is essentially a preamble of the statute. In the operational provisions of the statute, the more general term “person” is used. This term is broader than “citizen” and compels a finding that the legislature did not intend to so limit access to public records. See, Dep’t of Labor v. Cruz, 45 N.J. 372, 380 (1965) and In re Zhan, 424 N.J. Super. 231, 237 (App. Div. 2012).

The beginning point for determining the intent of a statute is the language of the statute itself. Courts must be bound by the axiom that when a legislature speaks by drafting a statute, the law says what the legislature meant. Thus, if the words of a statute are plain, clear and unambiguous, the “judicial inquiry is complete.” Connecticut Nat’l Bank v. Germain, 503 U.S. 249,253-54 (1992). In this state, the New Jersey Supreme Court has ruled:

When interpreting statutory language, the goal is to divine and effectuate the Legislature’s intent. In furtherance of that goal, we begin each such inquiry with the language of the statute, giving the terms used therein then ordinary and accepted meaning. When the Legislature’s chosen words lead to one clear and unambiguous result, the interpretative process comes to a close, without the need to consider further intrinsic aids. We seek out extrinsic evidence, such as legislative history, for assistance when statutory language yields “more than one plausible interpretation.” (citations omitted). State v. Shelley, 2015 N.J. 320, 323 (2011) citing to and quoting DiProspero v. Penn, 183 N.J. 477, 492-93.

In the court’s view, the language of OPRA is clear and unambiguous. Access to public records under OPRA is not limited to New Jersey “citizens.” If the Legislature intended to do so it could have, as the Virginia Legislature did, incorporating that term in the statute’s operational provisions.

Furthermore, public policy as evidenced in the statute’s legislative Findings and Declarations, the very paragraph relied on by OCPO, provides “[a]ny limitation on the right of

access accorded by [OPRA], **shall be construed in favor of the public's right of access.**" N.J.S.A. 47:1A-1 (emphasis supplied). Thus to the extent there is any ambiguity in the law as to the scope of those entitled to access, such ambiguity must be resolved in favor of a more liberal reading. Such a reading of the statute would also comport with the generally liberal view of standing taken by New Jersey courts. In re Camden County, 170 N.J. 439, 449 (2002).

It is clear that taken to its logical conclusion, the position advanced by OCPO would leave many parties who have a legitimate need to access to public records without recourse. For example, a non-resident property owner and taxpayer could not obtain public records affecting his property; the out-of-state motorist involved in an accident would be unable to access documents from law enforcement officials relating to the incident; and a newspaper, published in a neighboring state but circulated in New Jersey, investigating a claim of alleged official misconduct or corruption would be barred from obtaining public records. Clearly, all of these parties have a real and legitimate interest in obtaining those records but, under OCPO's overly restrictive view of the reach of OPRA would be prevented from doing so. This would clearly frustrate the intent and purpose of the statute.

CONCLUSION

For these reasons, the court finds in favor of the plaintiff. Counsel for plaintiff shall submit a certification of legal fees and court costs for review within twenty days from the date of the order accompanying this opinion. Defendant OCPO shall have ten days thereafter to submit a written response to plaintiff's certification.